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No. 90-1201

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

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H. PAUL LILLEBO, *et al.*,

*Petitioners,*

*v.*

GRAY DAVIS, in his capacity as the Controller of the State of California, and CALIFORNIA STATE EMPLOYEES' ASSOCIATION,

*Respondents.*

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**On Petition for a Writ of Certiorari to the Court of Appeal of California, Third Appellate District**

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## BRIEF FOR THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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March 22, 1991

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## INTRODUCTION

Pursuant to Supreme Court Rule 37.2, the National Right to Work Legal Defense Foundation ("Foundation") submits this brief *amicus curiae* in support of petitioners. All parties have given written consent to its filing.

## INTEREST OF THE *AMICUS CURIAE*

The Foundation is a non-profit, charitable organization formed to provide free legal assistance nationwide to individual employees who, as a consequence of their subjection to compulsory unionism, suffer violations of their right to work, freedoms of association, speech, petition and religion, right to procedural due process of law, and other fundamental liberties guaranteed by the constitutions and laws of the United States and the States. The Foundation has supported several major cases involving the issue presented by this case, *i.e.*, the right of employees to refrain from paying, in whole or in part, compulsory dues or fees which labor organizations use in legislative and judicial lobbying or other forms of political and ideological activism. Those cases include *Abood v. Detroit Board of Education*,[1] *Ellis v. Railway Clerks*,[2] *Teachers Local 1 v. Hudson*,[3] *Communications Workers v. Beck*,[4] and *Lehnert v. Ferris Faculty Association*,[5] the last of which is now awaiting decision by this Court.

The Foundation has a specific interest in this case, because its staff attorneys represent more than eight hundred nonunion public employees who are required to pay compulsory union fees under the statute at issue here and similar California statutes. The Foundation is generally concerned with the case, morever, because, unless reversed, the decision of the California Court of Appeal will seriously undermine the rights of nonunion employees recognized in *Abood*, *Ellis*, and *Beck*, and their

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[1] 431 U.S. 209 (1977).

[2] 466 U.S. 435 (1984).

[3] 475 U.S. 292 (1986).

[4] 487 U.S. 735 (1988).

[5] 881 F.2d 1388 (6th Cir. 1989) (2-1 decision), *cert. granted*, 110 S. Ct. 2616 (1990), *argued*, 59 U.S.L.W. 3361 (U.S. Nov. 5, 1990) (No. 89-1217).

precursor, *Machinists v. Street*,[6] not to subsidize the lobbying and other political and ideological activism of labor unions. The Foundation submits this brief to emphasize the serious threat to the political freedoms of all American workers posed by the Court of Appeal's decision.

## SUMMARY OF THE ARGUMENT

This Court should grant the petition because the decision of the Court of Appeal licenses the union to function as petitioners' forced "representative," and to collect "fair share fees," for the purposes of legislative lobbying that is undeniably *not* part of the statutory process of collective bargaining in California. The Court of Appeal's attempt to rationalize this result on the basis of *Abood* fails, because *Abood* explicitly countenanced the exaction of "fair share fees" only for such lobbying as is "an integral part of the bargaining process."[7]

This Court should also grant the petition because the Court of Appeal's decision logically supports forcing public employees to subsidize a union's political activism, in addition to legislative lobbying that is not "an integral part of the bargaining process." Moreover, the reasoning of the decision would apply equally well to *any* special-interest group in American society. Thus, the Court of Appeal's decision squarely contradicts *Abood*, which discountenanced the collection of "fair share fees" for political activism as a matter of law.[8]

Finally, although this Court will decide the issue of forced lobbying in *Lehnert*, it should nevertheless grant the petition here and at the least summarily reverse, so as explicitly to disapprobate

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[6] 367 U.S. 740 (1961).

[7] 431 U.S. at 236.

[8] *Id.* at 235. *See infra* note 33.

the gross misreading of *Abood* the Court of Appeal used to rationalize the exaction of "fair share fees" for legislative lobbying.

## ARGUMENT

### I. A writ of certiorari should issue, because petitioners raise an important constitutional question which *Abood* does not directly answer.

**A.** This Court should issue a writ of certiorari in this case because petitioners present an issue that implicates far more than simply the definition of what supposedly "collective-bargaining" activities a union designated as the exclusive representative of nonunion public employees may require them to support financially as a condition of their employment, consistent with the First and Fourteenth Amendments to the Constitution of the United States. For here, as authoritatively construed by the California Court of Appeal,[9] the Dills Act[10] does not just require nonmembers to pay a "fair share fee" for unquestionably "collective-bargaining" activities, or even for "lobbying" that is arguably "an integral part of the bargaining process,"[11] but also compels such payments for "lobbying" that both the act itself[12]

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[9] Appendix to Petition for a Writ of Certiorari ("App.") at A-1.

[10] Cal. Gov't Code §§ 3512-24 (West 1980 & Supp. 1991).

[11] *Abood*, 431 U.S. at 236.

[12] Cal. Gov't Code § 3515.8 (West Supp. 1991) (emphasis added) explicitly provides that the "pro rata share [of the 'fair share fee'] subject to refund shall not reflect * * * the costs of supporting lobbying activities designed * * * to secure for the employees represented advantages in wages, hours, and other conditions of employment *in addition to those secured through meeting and conferring with the state employer*."

and the Court of Appeal[13] have recognized as plainly *outside of*—not "integral" to—the bargaining process. In this particular, then, the Dills Act is not a "collective-bargaining" statute at all, but rather a *forced-lobbying* statute *simpliciter*.[14]

**B.** The status of the union designated as the nonmembers' statutory exclusive representative[15] for the "limited" purpose of collective bargaining with respect to "wages, hours, and other terms and conditions of employment"[16] is merely the *identifying criterion*, but no *operational justification*, for the Dills Act's further implicit license to that union to expend "fair share fees" on lobbying.[17] For, in contradistinction to the cause-and-effect

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[13] *See* App. at A-36 to A-37.

[14] As far as dissenting nonunion employees are concerned, all compulsory public-sector collective-bargaining laws are forced-lobbying statutes with respect to the subject matters of collective bargaining, as the laws compel nonmembers to accept unwanted unions as their exclusive representatives for the purpose of petitioning their employers, agencies of government, as to terms and conditions of their employment. However, this Court has held that requiring nonunion employees to subsidize such forced lobbying is constitutional where it involves negotiations, contract administration, grievance adjustment, or other activities that are "an integral part of the bargaining process." *Abood*, 431 U.S. at 232, 236. The constitutional question remains open where, as here, the forced lobbying is *not* "an integral part of the bargaining process." In this brief, therefore, *amicus curiae* will import by the noun "lobbying" only that "lobbying" that is not also "an integral part of the bargaining process."

[15] Cal. Gov't Code § 3515.5 (West 1980).

[16] Cal. Gov't Code § 3516 (West Supp. 1991).

[17] The act nowhere explicitly authorizes a union to function as an exclusive, or even any compulsory, representative for lobbying. However, it excepts from an employee's "right to demand and receive * * * a return" of part of a "fair share fee" that amount which the union spends on "lobbying activities designed * * * to secure for the employees represented advantages in wages, hours, and other conditions of employment *in addition to those secured through meeting and conferring with the state employer*." Cal. Gov't Code § 3515.8 (West **[cont. over]**

relationship of interlocking legal duties between exclusive representation and "fair share fees" in the context of collective bargaining, in the context of the union's lobbying *simpliciter* ***no*** equivalent or even analogous relationship exists:

**1.** The union's indirect license as the nonmembers' supposed "representative" for purposes of lobbying is not as a matter of California law legally exclusive. The act provides that "the scope of [exclusive] representation shall *not* include consideration of the merits, necessity, or organization of *any service or activity provided by law* or executive order."[18] And, the union constitutionally may not be made the nonmembers' exclusive representative for lobbying.[19]

**2.** As a practical matter, too, the rationale for designating a single union as the representative of all employees in the context of collective bargaining, *i.e.*, avoiding what *Abood* described as "confusion," "rivalries," "dissension," and "conflicting

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Supp. 1991) (emphasis added). Thus, *sotto voce* the act ensconces the union in the position of a representative of dissenting employees for the purpose of lobbying.

[18] Cal. Gov't Code § 3516 (West Supp. 1991) (emphasis added). Moreover, Cal. Gov't Code § 3515.5 (West 1980), which provides that "the recognized employee organization is the only organization that may represent [an appropriate] unit in employment relations with the state," further mandates that "[n]othing in this section shall prohibit any employee from appearing in his own behalf in his employment relations with the state." Therefore, if union lobbying is arguably part of "employment relations with the state" (which *amicus curiae* questions), then the union's "representational" role in that activity must be reconciled with each employee's retained statutory right to "appea[r] in his own behalf" before the legislature. The Court of Appeal ridiculed the efficacy of this reserved statutory right of employee self-representation. *See* App. at A-40 to A-45. Whatever the merit of its views may be where the formal, structured process of collective bargaining with specific state-agency employers is concerned, they lack cogency in the open-ended context of lobbying the legislature.

[19] *See Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 174-76 (1976), *as interpreted in Abood*, 431 U.S. at 230.

demands,"[20] collapses in the context of lobbying. For, in the legislative arena, political turbulence and turmoil are part and parcel of the plurality and diversity of views, robust debate, and political and ideological competition the First Amendment protects and, indeed, encourages.[21]

3. Moreover, although in collective bargaining both the state-agency employer and the union have legally enforceable duties to "meet and confer,"[22] in the realm of lobbying a union designated as an exclusive representative for purposes of collective bargaining enjoys *no* right to require the legislature to entertain its petitions[23] and suffers *no* duty to petition the legislature on "wages, hours, and other conditions of employment

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[20] "The designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inte -union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations." *Abood*, 431 U.S. at 220-21.

[21] *See, e.g., Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-45 (1961).

[22] Cal. Gov't Code §§ 3517, 3518, 3519(c)-(d), 3519.5(c)-(d) (West 1980 & Supp. 1991).

[23] The Court of Appeal denigrated as a "quibble over semantics" the question of whether the California legislature is, in some sense, the nonmembers' "employer." App. at A-35 to A-37. Whatever the accuracy of the court's characterization of the legislature as the "employer" where lobbying may be concerned, the Dills Act clearly excludes the legislature from any duty to "meet and confer" with a union, by mandating solely that the "Governor, or his representative as may be properly designated by law, shall meet and confer • • • with representatives of recognized employee organizations." Cal. Gov't Code § 3517 (West 1980). And, of course, a union has no constitutional right to require the legislature to deal with it in the law-making process. *See Minnesota State Bd. v. Knight*, 465 U.S. 271, 283-85 (1984).

in addition to those secured through meeting and conferring with the state employer"[24] or on any other subject of concern to the employees it ostensibly represents in the bargaining process.[25]

Therefore, because the rationale for allowing "fair share fees" in the context of compulsory public-sector collective bargaining—namely, as financial compensation to the union for the tasks of negotiation, contract administration, and grievance adjustment that the law *requires* it to carry out fairly and impartially on behalf of all employees[26]—does not exist in the quite different context of forced lobbying, the petition presents a substantial constitutional issue which *Abood* did not directly answer. Absent this Court's intervention, some state courts and inferior federal courts will continue inaptly to apply *Abood* and related collective-bargaining cases to activities that have nothing functionally to do with collective bargaining, with predictably dire consequences for the First- and Fourteenth-Amendment rights of dissenting nonunion employees.

## II. This Court should issue a writ of certiorari, because the California court's reasoning supports both forced lobbying and *forced political activism* for *all* interest groups in American society, not just public employees.

The decision of the Court of Appeal is particularly pernicious, and ultimately without limit, because the court's reasoning inexorably rationalizes *forced political activism*, as well as forced lobbying, both for public employees and for members of every other identifiable interest group in American society.

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[24] Cal. Gov't Code § 3515.8 (West Supp. 1991).

[25] The Dills Act defines "state employer" as "the Governor or his or her designated representative." Cal. Gov't Code § 3513(j) (West Supp. 1991). So, a union's duty as a collective-bargaining representative to "meet and confer" with the "state employer" has no limiting effect on its privilege to lobby, *or to refrain from lobbying*, the legislature.

[26] *See Abood*, 431 U.S. at 221-26.

A. According to the Court of Appeal, the Dills Act recognizes the legislature as the nonmembers' "employer" for the purposes of lobbying by the union.[27] The Court of Appeal presumed the union capable of representing nonmembers in lobbying with respect to "advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and conferring with the state employer,"[28] because the union, as the nonmembers' exclusive agent for collective bargaining, also deals with wages, hours, and other conditions of employment that are "secured through meeting and conferring with the state employer."[29] And the Court of Appeal considered a "fair share fee" for such lobbying proper, because it believed that "a nonunion unit member benefitting from that [lobbying] representation should * * * be expected to contribute towards the cost of achieving it."[30]

Now, under the universally accepted theory of American constitutional government, even in California the legislature is merely the collective agent of the people. If the legislature is the public employees' mediate "employer" under the Dills Act for any purpose, then their ultimate "employer" must be the legislature's principal, the electorate.[31] Therefore, on the reasoning of the Court of Appeal that forced lobbying is warranted, because the legislature has designated itself as "employer" for that purpose, nothing precludes the legislature

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[27] App. at A-35 to A-38.

[28] Cal. Gov't Code § 3515.8 (West Supp. 1991).

[29] *See* App. at A-37.

[30] *Id.* at A-38. Lobbying "squarely implicates the essential state interest in eliminating the 'free rider' problem * * * ." *Id.*

[31] *See* Cal. Gov't Code § 3523(a) (West 1980), mandating that "[a]ll initial meet and confer proposals of recognized employee organizations shall be presented to the employer at a public meeting, and such proposals thereafter shall be a public record."

from also authorizing forced political activism—that is, the extraction from dissenting public employees of "fair share fees" for campaigning to convince the public to elect candidates to the legislature who support the union's view of what are appropriate "advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and conferring with the state employer."

Surely, if the legislature can be characterized as the nonmembers' "employer" for purposes of union lobbying, the public can be characterized as their "employer" for purposes of union electioneering. And, if the former characterization will support the extraction of "fair share fees" for lobbying, the latter will equally rationalize similar exactions for partisan-political campaigning. For, in both cases, absent the collection of fees, "nonunion unit members" will assumedly benefit from the union's "representation"—in terms of the enactment of favorable legislation or the election of pliant legislators—without "contribut[ing] toward the cost of achieving it."[32]

In short, if the Court of Appeal's opinion is correct as to the constitutionality of forced lobbying, it must also in principle rationalize forced political activism. And that would be a radical departure, not only from the basic tenets of First-Amendment jurisprudence, but also from any sensible reading of *Abood*.[33]

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[32] *Amicus curiae* merely *assumes* "benefit" for the sake of argument. Nonmembers may, and as evidenced by their very nonunion status do, have numerous economic and political reasons for disputing the value to them of union lobbying and electioneering.

[33] *Abood* held that nonunion public employees may *not* be required to subsidize union activities "on behalf of political candidates, or towards the advancement of other ideological causes not germane to [the union's] duties as collective-bargaining representative." 431 U.S. at 235. The direct linguistic linkage between "political candidates" and "*other* ideological causes not germane to [the union's] duties" demonstrates that *Abood* considered support of "political candidates" "not germane" to collective bargaining *as a matter of law*.

**B.** Furthermore, the Court of Appeal's twisted logic has potentially universal application. For, under that reasoning, *any* organization that purports in some manner to "represent" an identifiable group, the members of which the legislature assumes share a community of interests, could be designated the lobbying, or even the partisan-political, "representative" of everyone in that group and allowed to charge a "fair share fee" for this coercive "service," without constitutional hindrance. And any organization lusting for this Orwellian license would need to satisfy but two hardly onerous criteria: (i) that its lobbying or political activism would advance what it perceives as the common interests of the group it claims to "represent"; and (ii) that, absent a power to exact a "fair share fee" from dissidents, the latter would constitute "free riders" on the benefits supposedly flowing from the "representation" the organization imposes on them.

To label this fear unfounded would be naive, if the sordid history of attempts to co-opt and prostitute public power by private special-interest groups under the statutory mechanism of exclusive representation is at all instructive.[34] And not to check the danger in this case, when it is yet isolated and easily thwarted, would allow—indeed, encourage and enable—that danger to grow to proportions that might overwhelm any later judicial resistance to the radical politicization of American society into the "goose-stepping brigades" of ideological conformists "at least partially regimented behind causes which they oppose," against the creation of which Mr. Justice Douglas foresightedly premonished this Court in *Lathrop v. Donohue*.[35]

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[34] *See* National Industrial Recovery Act, Act of June 16, 1933, ch. 90, 48 Stat. 195, *declared unconstitutional in A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

[35] 367 U.S. 820, 884 (1961)(dissenting). The Court of Appeal's pernicious doctrine has already been extended to contexts other than public employment. In *Shaw v. Flight Attendants*, 118 Lab. Cas. (CCH) ¶ 10,543, at 27,353 (W.D. Mo. Aug. 21, 1990), the court applied public-sector agency-shop cases to hold that section 2, Eleventh of the Railway Labor Act, 45 U.S.C. § 152, Eleventh (1982), constitutionally authorizes unions to charge nonmembers for [cont. over]

## III. This Court should issue a writ of certiorari to correct the basic misinterpretation of *Abood* that pervades the opinion of the Court of Appeal and has misled other courts.

**A.** The Court of Appeal's perverse misreading of *Abood* is not unique. Other lower courts have misinterpreted that decision, too (although not in ways as broadly erroneous as the Court of Appeal's blanket licensing of forced lobbying). Two of those lesser misreadings this Court has, unfortunately, passed over in silence.[36] One related misinterpretation it has addressed and corrected.[37]

Yet another misapplication of *Abood* hopefully will be corrected shortly in *Lehnert*,[38] which presents, *inter alia*, a question parallel to that here. Therefore, the Court should hold this petition until it decides *Lehnert*. If the Court rules in *Lehnert* that the Constitution prohibits all forced lobbying other than that which is "an integral part of the bargaining process"[39] between an exclusive representative and dissenting nonmembers' employer, then it should grant the petition in this case and, at the

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lobbying activities insofar as they "address legislation and regulations affecting the terms and conditions of employment of members of the bargaining unit." *Shaw* disingenuously ignored the fact that those public-sector cases relied on purported differences between private- and public-sector employment to *distinguish* the holding of *Street* that, as this Court put it in *Ellis*, 466 U.S. at 447 (emphasis added), objectors "could not be burdened with *any part* of the union's expenditures in support of political or ideological causes." *See Lehnert*, 881 F.2d at 1391-92; *Robinson v. New Jersey*, 741 F.2d 598, 604-10 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985).

[36] *Robinson*, cited *supra* note 35; *Champion v. California*, 738 F.2d 1082 (9th Cir. 1984), *cert. denied*, 469 U.S. 1229 (1985).

[37] *See Keller v. State Bar*, 110 S. Ct. 2228 (1990).

[38] 59 U.S.L.W. 3361 (U.S., argued Nov. 5, 1990) (No. 89-1217).

[39] *Abood*, 431 U.S. at 236.

least, summarily reverse on the authority of *Lehnert*.[40] The Court should not merely vacate and remand for reconsideration in light of *Lehnert*, because the Court of Appeal has already twice shown an unwillingness to follow this Court's teachings, and because the gross errors in the Court of Appeal's opinion, exploded *infra*, cry out for explicit disapprobation.[41]

**B.** The Court of Appeal assumed that, under *Abood*, the controlling issue in deciding the constitutionality of forced lobbying—or, for that matter, the constitutionally permissible extent of any allegedly "representational" activity of a public-sector union—is the identity of the "employer." If the union "interact[s]" with the "employer" in a "representational" capacity, the Court of Appeal simplistically reasoned, the union may charge dissenting employees a "fair share fee" for its alleged "services."[42] That is wrong.

The controlling question under *Abood* is not whether the union "interact[s]" with the "employer" in a supposedly "representational" (or any other) capacity, but whether its "interact[ion]" with the "employer," or even with some entity other than the immediate "employer," is "an integral part of the

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[40] That disposition would be consistent with the practice of the Court where the law is settled by a prior decision. *See, e.g.*, 388 U.S. 440-54 (1967), where the Court summarily reversed ten lower court judgments citing *Redrup v. New York*, 386 U.S. 767 (1967).

[41] The importance of this task is manifest. For, as the Court said in *Abood*, "'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics • • • or other matters of opinion or force citizens to confess by word or act their faith therein.' These principles • • • are no less applicable to the case at bar" involving compulsory public-sector collective bargaining. 431 U.S. at 235 (citation omitted) (*quoting West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

[42] App. at A-35 to A-37.

bargaining process" *vel non*.[43] If it is not, the identity of the "employer" and the purportedly "representational" character of the union's activity are beside the point.

Thus, in this case, whether or not the legislature is petitioners' "employer," "fair share fees" to defray the costs of certain limited types of lobbying by the union, explicitly defined in the Dills Act,[44] may be constitutionally permissible, because *that* lobbying *is* "an integral part of the bargaining process," in as much as it is necessary for a collective-bargaining agreement to become effective as a matter of law. However, and again whether or not the legislature is petitioners' "employer," other types of lobbying that the Dills Act explicitly recognizes as "designed * * * to secure for the employees represented advantages in wages, hours, and other conditions of employment *in addition to those secured through meeting and conferring with the state employer*"[45] are clearly not "an integral"—or even any—"part of the bargaining process," and therefore cannot constitutionally support the imposition of "fair share fees."

C. On the basis of its "summary of high court cases," the Court of Appeal concluded that

> the test for dividing * * * between chargeable and nonchargeable expenses can be boiled down to this: when the union is acting qua union, expenses can be exacted; when it is merely an organization taking actions having no connection with the representation of the bargaining unit on employment-related matter, expenses may *not* be exacted.[46]

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[43] *Abood*, 431 U.S. at 236.

[44] Cal. Gov't Code §§ 3517.5, 3517.6 (West 1980 & Supp. 1991).

[45] Cal. Gov't Code § 3515.8 (West Supp. 1991) (emphasis added).

[46] App. at A-37.

That is not only wrong, but even nonsensical.

**1.** What it means for a "union [to be] acting qua union," the Court of Appeal did not explain. If the court meant by this cryptic comment what typical unions typically do to advance the interests of their voluntary members, its "test" wildly exaggerates the ambit of the authority to charge "fair share fees" to dissenting nonmembers. For unions generally engage in numerous activities, other than collective bargaining, that their voluntary members desire—which the Dills Act explicitly recognizes.[47] But if "expenses can be exacted" from nonmembers whenever the union is performing "union-like" functions, then the "fair share fee" reduces simply to a disguised subsidy of the union as an institution, with no necessary relationship to the union's actual costs of negotiations, contract administration, and grievance adjustment.

**2.** The court's further question-begging elaboration—that "the union is acting qua union" when it is "an organization taking actions having * * * [a] connection with the representation of the bargaining unit on employment-related matter"—is no better explanation or excuse for the exaction of a "fair share fee" from nonunion employees in that unit. For the standard under *Abood* is, not whether the union's actions have *some undefined* "connection with the representation of the bargaining unit on employment-related matter," but instead whether those actions come within the operational categories of negotiations, contract administration, and grievance adjustment, or are otherwise "an integral part of the bargaining *process*."[48]

At the logical margin, *anything* that a union which is the exclusive representative of a group of employees does to further,

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[47] Cal. Gov't Code § 3513(a) (West Supp. 1991) (emphasis added) requires only that an "employee organization" have "as *one* of its primary purposes representing * * * employees in their relations with the state."

[48] *Abood*, 431 U.S. at 232, 236 (emphasis added).

in its view, their economic *or political* welfare as employees is "connect[ed] with the representation of the bargaining unit on employment-related matter," simply because *the union* (the representative) is doing it "for" the employees (thereby rendering its action "employment-related," by definition)! Thus, under the Court of Appeal's *ersatz* "test," the union's narrow *statutory* grant of a "scope of representation * * * *limited* to wages, hours, and other terms and conditions of employment"[49]—the *only* type of statutory grant of "representational" authority that this Court has ever countenanced—expands into an unlimited (and thus *un*constitutional) license to charge essentially all of its expenses to nonmember employees through the "fair share fee" (just as it charges all of its expenses to its voluntary members through its regular membership dues).[50]

In short, the Court of Appeal's "test" perverts the "fair share fee" allowed in *Abood* from a narrowly circumscribed financial *quid pro quo* for demonstrable "collective-bargaining" services the union provides to nonmembers into a broad institutional subsidy of the union as an organization. If that reading of *Abood* were correct, which it is not, then as a practical matter *Abood* would be merely a judicial "tale told by an idiot, full of sound and fury, signifying nothing."

D. Finally, the Court of Appeal feigned inability to

> fathom how a union's lobbying the Legislature for improvement of the conditions of employment of the members of its bargaining unit—union and nonunion alike—could not be considered to be part of its role as representative, nor why a nonunion unit member benefitting from that representation should not be

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[49] Cal. Gov't Code § 3516 (West Supp. 1991) (emphasis added).

[50] *See Lehnert v. Ferris Faculty Ass'n*, 707 F. Supp. 1473, 1482 (W.D. Mich. 1988).

> expected to contribute towards the cost of achieving it.[51]

The simple corrective for that ignorance is to recognize that *Abood* did not sanction "fair share fees" to subsidize union lobbying of the legislature for *any* purpose.[52]

*Abood* countenanced collection of "fair share fees" from nonunion *public*-sector employees on the basis of this Court's precedents that dealt solely with *private*-sector collective bargaining.[53] Because the *Abood* Court believed that the "differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights" for employees, it held that the private-sector decisions were "controlling" in the public sector, too.[54] *But, in the private sector, lobbying and collective bargaining are, in the legal sense, utterly distinct.*[55] So, *Abood*—based as it was on an application of what the Court itself treated as conceptually "controlling" decisions from the private sector—could not possibly have sanctioned lobbying as part of a public-sector union's "role as representative" that could constitutionally be charged to nonunion employees in "fair share fees."

The Court of Appeal's opinion on this point, then, is a mere *ipse dixit*. The Court of Appeal may illogically believe that union lobbying on subjects that even the Dills Act candidly acknowledges are "*in addition to* those secured through meeting

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[51] App. at A-37 to A-38 (footnote omitted).

[52] Of course, where "lobbying" is "an integral part of the bargaining process" that "lobbying" *is* "collective bargaining," by definition. *See supra* note 14.

[53] *See* 431 U.S. at 217-32.

[54] *Id.* at 232.

[55] *See Street*, 367 U.S. at 768-70 & n.17.

and conferring with the state employer"[36] is part of the union's "role as [*collective-bargaining*] representative"—but *Abood* provides no rational support for that view. Quite the opposite.

Notwithstanding its nonsensicality, the Court of Appeal's *ipse dixit* is a dangerous precedent, however, because it divorces the activities for which a union may exact "fair share fees" (here, lobbying) from the purpose for which that union has been designated the nonunion employees' exclusive representative (in all cases, collective bargaining). Under *Abood*, "fair share fees" are chargeable *only* where the activities and the purpose operationally coalesce; whereas, under the Court of Appeal's decision, "fair share fees" are chargeable for whatever activities the "representative" undertakes ostensibly "on behalf of" employees, regardless of the functional connection, or lack thereof, of those activities to the *process* of collective bargaining. Under *Abood*, the specific character of the activities, not the mere status of the union as the "representative," controls the constitutional result; whereas, under the Court of Appeal's decision, the mere status of the union validates as chargeable any activities that the union deems tend towards "improvement of the conditions of employment." In short, the Court of Appeal's decision grants the union unlimited license to use dissenters' fees.

## CONCLUSION

The California Court of Appeal has decided an important question of federal constitutional law which has not been, but should be, settled by this Court, and has decided it in a way that conflicts with principles of First-Amendment jurisprudence as previously applied by this Court in its agency-shop decisions. However, because that question will undoubtedly be settled in *Lehnert*, this petition should be held until the Court issues its decision in *Lehnert*. Then, for the reasons stated above, the

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[36] Cal. Gov't Code § 3515.8 (West Supp. 1991) (emphasis added).

Court should summarily reverse the decision of the court below on the authority of *Lehnert*.

Respectfully submitted,

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